

Tocco, Inc. and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO. Cases 10-CA-30754, 10-CA-30789, and 10-CA-30869

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On July 1, 1998, Administrative Law Judge Lawrence W. Cullen issued the attached Bench decision. The Acting General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Tocco, Inc., Boaz, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Furnish to the Union in a timely fashion the information requested by the Union on December 18, 1997, February 2 and March 6, 1998."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

¹ There are no exceptions to the unfair labor practices found by the judge. We have, however, consistent with the Acting General Counsel's exceptions, modified the recommended Order and notice to more closely reflect the violations found and the Board's usual remedial provisions.

WE WILL NOT withdraw recognition from International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO and refuse to bargain with the Union concerning the rates of pay, wages, hours, and terms and conditions of employment of our employees in the following appropriate unit:

All regular full-time and regular part-time production and maintenance employees, including operators, maintenance technicians, test employees, field service employees, custodians, painters, shippers, and store room employees employed by us at our Boaz, Alabama, facility but excluding all office clerical employees, professional or technical employees, temporary employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to furnish information relevant and necessary to the Union as the collective-bargaining representative of the unit employees.

WE WILL NOT institute unilateral changes in the pay, wages, hours, and terms and conditions of employment of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our withdrawal of recognition from the Union.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above-described unit.

WE WILL in a timely fashion furnish the Union with the information requested on December 18, 1997, February 2 and March 6, 1998.

WE WILL, on request by the Union, rescind any or all unilateral changes in wages, hours, or other terms and conditions of employment and restore the status quo.

WE WILL make our employees whole, with interest, for any loss of earnings or benefits they may have suffered as a result of our withdrawal of recognition from the Union and our institution of unilateral changes in the wages, hours, or other terms and conditions of employment.

TOCCO, INC.

Lisa Y. Henderson, Esq., for the General Counsel.
Clifford R. Oviatt Jr., Esq., and *F. Frank Keene, President*, for the Respondent.

Robert S. Giolito, Esq., for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case was heard before me on June 1 and 2, 1998. I issued a Bench Decision on June 2, 1998, pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations on the entire record in this proceeding including my consideration of the

exhibits filed and the brief of the Charging Party and the arguments of counsel for all parties at the hearing. In accordance with Section 102.45 of the Board's Rules and Regulations I certify the accuracy of, and attach as "Appendix A" the pertinent portion of the trial transcript (pp. 445-466) as corrected and modified.

THE REMEDY

Having found that the Respondent has engaged in violations of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes of the Act and post the appropriate notice.

It is recommended that Respondent rescind its withdrawal of recognition from the Union, that it bargain with the Union for a reasonable time, that it provide the information requested by the Union, and that on request by the Union, that it rescind any or all of the unilateral changes and restore the status quo, and that it make the employees whole for any loss of earnings or benefits sustained by them as a result of the unlawful withdrawal of recognition and implementation of unilateral changes in its employee's terms and conditions of employment in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Tocco, Inc., Boaz, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from and refusing to bargain with International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO in the above-described appropriate unit, failing and refusing to furnish information necessary for bargaining and instituting unilateral changes in its employees' terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Rescind its withdrawal of recognition from the Union.

(b) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All regular full-time and regular part-time production and maintenance employees, including operators, maintenance technicians, test employees, field service employees, custodians, painters, shippers, and store room employees employed by the Respondent at its Boaz, Alabama, facility but exclud-

ing all office clerical employees, professional or technical employees, temporary employees, guards and supervisors as defined in the Act.

(c) Provide the aforesaid information requested by the Union.

(d) On request by the Union, rescind any or all unilateral changes unlawfully implemented and restore the status quo.

(e) Make its employees whole for any loss of earnings or benefits they may have sustained as a result of the Respondent's unfair labor practices, with interest, as set out in the remedy.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Boaz, Alabama, copies of the attached notice marked "Appendix [B]."³ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 16, 1997.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

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JUDGE CULLEN: All right, let's tentatively set 2:30 for this and I will ask that Counsel be in here at 2:30 unless there is some delay which I'll advise you.

MS. HENDERSON: Thank you.

MR. OVIATT: Your Honor, that particular exhibit was Charging Party's No. 4.

JUDGE CULLEN: All right, we're still on the record.

MR. OVIATT: Yes, it's Charging Party - let me look. I just had it here. I think it's Charging Party No. 4. Hold on.

JUDGE CULLEN: Charging Party's what?

MR. OVIATT: No. 4. No. 4, Your Honor.

JUDGE CULLEN: Okay, I've got it. Anything else before we go into a recess? Hearing nothing we will be in recess until 2:30.

(Off the record.)

¹ Interest shall be computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³ If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(Whereupon, the hearing in the above entitled matter was recessed at 1:15 p.m. to reconvene at 2:30 p.m. in the same place.)

DECISION

LAWRENCE CULLEN, Administrative Law Judge. This consolidated case was heard before me in Birmingham, Alabama on June 1 and 2nd, 1998.

The Order consolidating cases, amended consolidated complaint and notice of hearing was filed by the Regional Director of Region Ten of the National Labor Relations Board, ("the Board") on May 14, 1998. The Charge in Case 10-CA-30754 was filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers' of America, AFL-CIO, ("the Charging Party or the Union") on January 20,

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1998. The Charge in Case 10-CA-30789 was filed by the Union on February 9, 1998. The Amended Charge in Case 10-CA-30869 was filed by the Union on April 8, 1998.

The Complaint alleges that Respondent, Tocco, Inc ("the Respondent" or "the Company") has violated Sections 8(a)(1) and (5) of the National Labor Relations Act. The Respondent, by its Answer, filed on May 27, 1998, has denied the commission of any violations of the Act.

After hearing the testimony in this case and reviewing the exhibits received in evidence and the Charging Party's pre-hearing brief and the arguments of the General Counsel, Charging Party and Respondent on the record, I make the following findings of fact and conclusions of Law:

Respondent is an Alabama corporation with an office and place of business in Boaz, Alabama, where it is engaged in the design, manufacture and sale of precision induction heating equipment. During the twelve (12) month period preceeding issuance of the Complaint, Respondent, in conducting its aforesaid business operations shipped goods valued in excess of fifty thousand (\$50,000.00) from its Boaz, Alabama facility directly to customers outside the State of Alabama. Respondent is an employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

The appropriate unit.

The following employees of Respondent, herein called the unit, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act as certified in Case 10-RC-14495, as follows: All regular full-time and regular part-time production and maintenance employees, including operators, maintenance

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technicians, test employees, field service employees, custodians, painters, shippers, and store room employees employed by the Respondent at its Boaz, Alabama, facility but excluding all office clerical employees, professional or technical employees, temporary employees, guards and supervisors as defined in the Act.

On May 12, 1994, in an election by secret ballot conducted under the supervision of the Regional Director for Region Ten in Case 10-RC-14495, a majority of the employees in the unit described above, designated and selected the Union as their representative for the purpose of collective bargaining with

Respondent with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. On May 20, 1994, the Regional Director of Region Ten of the Board certified the Union as the exclusive collective bargaining representative of all the employees in the unit described above. At all times since May 20, 1994, by virtue of Section 9(a) of the Act, the Union has been and is the exclusive collective bargaining representative of the employees of the Respondent in the unit described above with respect to rates of pay, wages hours of employment and other terms and conditions of employment.

The Complaint alleges in paragraph ten (10) that since on or about September 22, 1997, and continuing thereafter and without prior notification to and bargaining with the Union, Respondent has unilaterally assigned unit employees to trainer positions and has unilaterally established pay rates for those unit positions.

It further alleges in paragraph eleven (11) that since on or about October 27, 1997, and continuing to date, Respondent has unilaterally and without prior notification to and

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bargaining with the Union, changed existing policies regarding employees' use of radios at their workstations.

The Complaint further alleges in paragraph twelve (12) that since on or about March 2, 1998, and continuing thereafter and without prior notification to and bargaining with the Union, Respondent has unilaterally moved unit employees to new shifts and has unilaterally eliminated shifts.

The Complaint further alleges in paragraph thirteen (13) that on or about December 18, 1997, and continuing thereafter, the Union made the following request for information: records, reports, documents, including classroom instruction participation, of any and all training of contract or permanent personnel conducted by employees assigned to the job of trainer from July 1997; how employees would be placed and their classification status under Respondent's proposal on job classification; Respondent's corporate policy on substance abuse; Respondent's current tuition reimbursement policy and Respondent's current bereavement policy.

The Complaint alleges in paragraph 14 that this information requested by the Union was necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the employees in the unit described above.

The Complaint also alleges in paragraph 15 that since on or about December 18, 1997, the Respondent has failed and refused to furnish to the Union the information described above.

The Complaint also alleges in paragraph sixteen (16) that on or about February 2, 1998, and continuing thereafter, the Union made the following request for information: names of employees affected by the return of trainers to their normal duties; dates(s)

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trainer pay was rescinded; names and department of employees still assigned to trainer status; and if those events were caused by reduction of contract personnel or cessation of training programs and the dates of those events.

The Complaint alleges in paragraph 17 that the information was necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the employees in the unit described above. The Complaint further alleges in paragraph eighteen (18) that since on or about February 2, 1998, and continuing thereafter, the Respondent has

failed and refused to furnish to the Union the information described above.

The Complaint further alleges in paragraph nineteen (19) that on or about March 6, 1998, and continuing thereafter, the Union made the following request for information: name, hire date and department of employees moved between shifts, elimination of any previously existing shift in any department; and the reasons for employee movement and shift elimination.

The Complaint in paragraph 20 further alleges that the information requested by the Union as described in paragraph 19 was necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the employees in the unit.

The Complaint further alleges in paragraph 21 that since on or about March 6, 1998, and continuing thereafter, the Respondent has failed and refused to furnish to the Union the information described above.

The Complaint further alleges in paragraph twenty-two (22) that on or about January 21, 1998, the Respondent withdrew recognition from the Union and since said

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date has failed and refused to recognize the Union as the collective bargaining representative of the employees described in the above paragraph.

The Complaint further alleges in paragraph 23 that by the acts and conduct described above, the Respondent has failed and refused and is failing and refusing to bargain collectively with the Union as representative of its employees, and Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) and 8(d) of the Act.

As I understand from the stipulation of the parties, the withdrawal of recognition actually occurred on January 28th.

Testimony was presented at the hearing and the General Counsel called Andy Huddleston, who is a supervisor of Human Resources for the Respondent and the custodian of the records and through him identified General Counsel's Exhibits 8, 9, 10 and 11. Charging Party submitted Exhibits 1 through 4.

The General Counsel also called as a witness in its case, Roy Don Bevis, who is an International Representative with the United Auto Workers and has been since June 13, 1993. Mr. Bevis testified that he was involved in the contract negotiations with the Respondent since August of 1994 and was involved in twenty six (26) meetings between that time and September of 1997.

He also testified that there were bargaining sessions held on September 17 and 18, 1997 and that at that time, no issue of trainer pay was raised by the employer.

He identified General Counsel's Exhibits 12 through 19, including requests of the Union for information and responses thereto received by the employer.

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He testified that at no time did the employer bargain with the Union as to what training pay should be or any other details of the trainer position.

He testified that there was no discussion about trainer pay.

He testified that he did not receive a response to items requested, items one (1) through five (5), requested in General Counsel's Exhibit 17.

He testified that he made a request for information in General Counsel's Exhibit 18 and did not receive a response to

General Counsel's Exhibit 18. Previously, a letter was sent to Bevis from Huddleston regarding trainer pay and the Union's request for information regarding trainers in response to General Counsel's Exhibit 12.

General Counsel's Exhibit 14 was a response to the Union with respect to the training pay differential.

General Counsel's Exhibit 15 was a request for information with General Counsel's Exhibit 16 being a response to that information.

He testified that in the fall of 1997, the Union raised the issue of radio usage with the company as the company had told employees to take their radios home. Previously, employees were permitted to play their radios while working. There was no prior indication to him about changing the radio policy. The company's counsel at the time, Kent Henslee, said that they had made a change in the radio policy due to complaints. Bevis was subsequently advised a few weeks later, this was in the fall of 1997, that the company had again changed its policy to a modified form of permitting radios to be played after certain hours.

He testified that in March of 1998, he was advised that the company had transferred employees and eliminated total shifts without notifying the Union. He also

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identified General Counsel's Exhibit 19, which is a request for information made by the Union to the Respondent. The date was March 6, 1998, requesting information with respect to the shift changes. He testified also that the Union has never received a response to General Counsel's Exhibit 19.

He also testified that the Respondent has been ordered to bargain in other Board Orders. Prior to January 1, 1998, the employer posted a notice with respect to bargaining of shift changes pursuant to a settlement agreement that was entered in a prior case.

Prior to this case, there have been two Administrative Law Judge's decisions, two Board decisions and 1 Court of Appeals Order of Enforcement.

In Board Case, *Tocco, Inc.* 323 NLRB No. 72 (1997) [not reported in board volumes] issued on April 18, 1997, the Board upheld Administrative Law Judge J. Pargen Robertson's decision of August 7, 1995. In his decision of 1995, the Administrative Law Judge found that Respondent had violated Section 8(a)(1)(3) and (5) of the Act. He found that the General Counsel had proved a prima facie case in support of the allegation that Respondent had eliminated its educational and relocation assistance because of its employees' union activity. He found that the Respondent had engaged in conduct in violation of Section 8(a)(1) and (3) by eliminating education and relocation benefits for unit employees in June of 1994. He found also that the loss of education and relocation benefits constitute mandatory bargaining subjects and Respondent's elimination of those benefits without notifying and bargaining with the Union constituted a violation of Section 8(a)(5) of the Act.

He further found that by changing its drug testing policy and testing employees resulting in the discharge of unit employees Kelley Dilbeck, Doyle Burns and Kurt McDaniel, without notifying and bargaining with the Union, Respondent had engaged in

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conduct in violation of Section 8(a)(1) and (5) of the Act. He further found Respondent thereby engaged in unfair labor prac-

tices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

He also found that Respondent had violated Section 8(a)(1) of the Act by threatening its employees that it had eliminated their education assistance because the employees selected International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW as their collective bargaining representative.

He ordered that Respondent cease and desist from unilaterally eliminating its education and relocation assistance policies because its employees elected the Union and are eligible to join the Union, without first notifying and bargaining with the Union as its employees' exclusive bargaining representative and from threatening to eliminate the education assistance.

He further ordered that Respondent cease and desist from unilaterally conducting drug tests among all bargaining unit employees without first notifying and bargaining with the Union.

He further ordered that the Respondent take the following affirmative actions necessary to effectuate the policies of the Act to remedy the violations that he had found. On request, bargain in good faith with the Union as the exclusive bargaining representative of the unit employees in the unit described herein above. Restore conditions to status quo ante as they existed before its unlawful actions. Restore to its employees in the above described bargaining unit the education and relocation assistance benefits as they existed before Respondent unlawfully eliminated those benefits and restore its drug testing policy to the policy that existed before it unilaterally changed its

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policy. Further, Respondent was ordered to offer to Kelley Dilbeck, Doyle Burns, and Kurt McDaniel immediate reinstatement to their former positions with full backpay and benefits and with interest in accordance with the remedy section of his decision, with no loss of seniority or other rights and privileges previously enjoyed. Further, Respondent was ordered to remove from its files any reference to its unlawful layoffs and refusal to reinstate its employees as found herein, and notify them in writing of this, and that said action shall not be used as a basis for future personnel actions. Respondent was further ordered to post the appropriate notice and to notify the Regional Director in writing within twenty (20) days of the date of the Order what steps the Respondent had taken to comply.

The Respondent chose to appeal this decision, as is its right to do, and on April 18, 1997, the Board issued its decision and Order in this case and affirmed the Administrative Law Judge's Order and entered the appropriate remedy with some minor modifications, but, in essence, essentially the same remedy as Judge Robertson had entered.

The Board's Decision went before the United States Court of Appeals for the Eleventh Circuit and on April 8, 1998, on Petition for Review of an Order of the National Labor Relations Board in *Tocco Inc. v. NLRB* Case No. 97-6646 the Petitioner/Respondent's motion to dismiss the petition for review without prejudice with the parties bearing their own costs on review was granted. The Petitioner/Respondent's motion to dismiss the NLRB's cross-petition for enforcement was denied.

Thus, the Board was granted enforcement of its Order by the Eleventh Circuit Court of Appeals

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On September 18, 1997, Administrative Law Judge Howard I. Grossman entered his decision in the Case of Tocco, Inc and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO in Cases 10-CA-29372 and 10-CA-30077. In his decision, Judge Grossman found the Respondent had violated Section 8(a)(1) of the National Labor Relations Act by coercively interrogating employees regarding an unfair labor practice charge filed by the Union against the Respondent. He found also that the Respondent had violated Section 8(a)(3) and (1) of the Act by issuing a final warning to Debra Ward on January 18, 1996, and by discharging her on March 18, 1996, because of her Union and other concerted protected activities. He further found that Respondent had violated Section 8(a)(4) and (1) of the Act by threatening an employee that it would institute legal proceedings or engage in other reprisals if the employee gave testimony in a Board proceeding, and by telling an employee that he was being treated differently because he gave evidence in support of the protected activity of fellow employees in filing a lawsuit against Respondent. He further found that Respondent had violated Section 8(a)(5) of the Act by unilaterally changing shift assignments on June 23, 1994, and doing the same on May 15, 1995, including elimination of the second shift, without giving the certified Union, notice and an opportunity to bargain over the changes.

He entered an Order that Tocco, Inc, its officers, agents, successors, and assigns, shall; cease and desist from

(A) Coercively interrogating employees regarding unfair labor practice charges filed against them by the Union.

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(B) Threatening employees that it will institute legal proceedings against them or engage in other reprisals if the employees give testimony in a Board proceeding.

(C) Telling employees that they are being treated differently because they gave evidence in support of the protected activity of fellow employees in filing a lawsuit against Respondent.

(D) Warning or discharging employees because of their Union or other protected concerted activity, or by discriminating against them in any other way with respect to their wages, hours of work, tenure, or other terms and conditions of employment.

(E) Transferring employees from one shift to another, or eliminating shifts, without first giving notice and an opportunity to bargain to International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.

(F) In any other like or similar manner, interfering with, restraining, or coercing its employees in violation of their rights under Section 7 of the Act.

He further ordered that the Respondent take the following affirmative action necessary to effectuate the purposes of the Act:

(A) Within 14 days after service of this Order, offer Debra Ward reinstatement to her former position, or, if that position no longer exists, to a substantially equivalent position, without loss of seniority and other rights, dismissing if necessary any employee hired to fill said position, and make her whole in the manner set forth in the remedy section of his Decision.

(B) Within 14 days after service of this Order, expunge from its records all references to its unlawful warning of Debra Ward on January 18, 1996, and its unlawful

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discharge of her on March 18, 1996, and inform her in writing that this has been done, and that the aforesaid actions will not be used as the basis of any future discipline of her.

No exceptions were filed to Judge Grossman's Decision and there being no exceptions filed, the Board in its Order of February 2, 1998 adopted the Decision of Judge Grossman.

On January 1 of this year, the employees filed a petition with the employer stating that they no longer wished the Union to represent them. On that basis, shortly thereafter, on January 28th 1998, the employer withdrew recognition.

At the time that the employer received the petition and at the time of the withdrawal of recognition, the above cited unfair labor practices had not been remedied. As the Charging Party argues in his Brief, the Board with the support of the Court has long upheld a presumption that an employer's unremedied refusal to bargain with an incumbent Union taints any evidence of the Union's subsequent loss of support. In this case, the Respondent has a difficult burden of submitting evidence that would rebut this presumption.

Particularly in point is a case cited by the Charging Party and the General Counsel and that is *Lee Lumber and Building Material Corp.*, 322 NLRB 175 (1996), affirmed in relevant part, 117 Fed Third 1454, (D.C. Circuit 1997). In that Case, the Board affirmed its practice of presuming that when an employer unlawfully fails or refuses to recognize and bargain with an incumbent Union, any employee disaffection from the Union that arises during the course of that failure or refusal results from the earlier unlawful conduct. At page 178, the Board held that "in the absence of unusual circumstances, we find that this presumption of unlawful taint can be rebutted only by an employer showing

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that employee disaffection arose after the employer resumed its recognition of the Union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining."

In this Case, before me the Respondent has not remedied the unfair labor practices that date back some years prior to the instant date. It has not resumed its recognition of the Union. It has not bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect bargaining.

In this Case, it is obvious from the statements of the various employees brought here to testify that they had signed the petition that there has been disaffection by the employees with the Union. However, the circumstances in this case clearly show that such disaffection would be inevitable. Obviously, the employer has the fist within the velvet glove to give the employees benefits and pay increases if it so chooses. On the other hand, it is the employer who wields the possibility of discharge or discipline of some sort that can affect the employees' economic status significantly. I find that any disaffection in this unit is to be presumed as arising from these unfair labor practices of violations of Sections 8(a)(1), 8(a)(3), 8(a)(4) and 8(a)(5). The 8(a)(5) violations go to the heart of the bargaining representative's status as a collective bargaining representative of the employees.

As the unfair labor practices were unremedied, they presumably affected the status of the Union in the employees' eyes. Thus, the employees may look at the Union as being

either ineffectual on the one hand or unduly argumentative and unwilling to reach an agreement on the other. In the face of these unfair labor practices, the

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Respondent was not in a position to withdraw recognition based on this petition. In doing so, it violated Sections 8(a)(5) and (1) of the Act.

I note that the testimony of these various employees was not quite as clear cut as I heard the Respondent argue in closing statement. While many of them said that they were not aware of the finding of the unfair labor practices by the Board, some of them indicated that they were aware of the situation that was going on with respect to employees having been discharged, and that some employees contended that they were discharged because of their union activities.

I have considered the *Quazite* Case, which is cited by the Respondent. I find it distinguishable from this case.

In *Quazite, Division of Morrison Molded Fibreglass Company v. National Labor Relations Board*, 87 F.3d 493 (D.C. Cir 1996), the Court noted that if the Board can establish a link between unfair labor practices it may impose a 12 month bargaining order. The Court noted that the Administrative Law Judge had found that the evidence did not support the Section 8(a)(5) allegation that *Quazite* had bargained in bad faith, but that the company had, indeed, committed other unfair labor practices.

In the instant case before me, there have been findings of Section 8(a)(5) violations which remain unremedied.

The court in the *Quazite* case further stated that during an initial 12 month period from the date that a Union is certified as a collective bargaining representative, it is conclusively presumed to enjoy the support of the majority of the employees in the collective bargaining unit. Thereafter, an employer may lawfully withdraw its recognition from the Union if it has a good faith doubt objectively founded that the Union

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continues to command majority support unless the employer's own unfair labor practices may account for the employee's diminished allegiance to the Union.

In that case, the D.C. Circuit agreed with the employer that the Board had disregarded its responsibility to give a reasoned explanation for its actions in issuing the bargaining order. It set out a four point test that the Board had used in *Master Slack Corporation*, 271 NLRB 78, 84 (1984), and which the court endorsed in *Williams Enters, Inc. v. NLRB*, 956, F.2d, 1226 (1992), as follows:

- 1.) The length of time between the unfair labor practices and the employee petition.
- 2.) The nature of the unfair labor practices including whether they are of a nature that would cause a lasting or detrimental effect on the employees.
- 3.) The tendency of the unfair labor practices to cause employee disaffection with the Union.
- 4.) The effect of the unlawful conduct on the employees' organizational activities and membership in the Union.

The D.C. Circuit Court of Appeals noted that the Board had provided no explanation for its key finding that the withdrawal of recognition occurred in an atmosphere poisoned by Respondent's commission of unfair labor practices which had the effect of contributing significantly to the Union's loss of majority among the bargaining unit employees. This case was not an

outright reversal of the Board. Rather, the D.C. Court of Appeals remanded "this matter for the Board to document its determination that the unremedied unfair labor practices in this case, individually and

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cumulatively, were the type of violations that tend to undermine the Union status in the employees' eyes and did so."

In the instant case, I have found that these unremedied unfair labor practices in the prior two cases and the Section 8(a)(5) allegations which I will find violations on herein after that in the fall of 1997 and continuing into 1998 were close in time with the withdrawal of recognition by the employer. There has not been a great period of time that has elapsed between the commission of these unfair labor practices between the finding of violations by the Administrative Law Judges, by the Board, ultimately upheld by the Court of Appeals. They were ongoing. They were hanging over everyone's head here. They were unresolved. And, the employees were in a position of getting the message that they were unresolved and had been unresolved for some time with no resolution in sight.

Now, with respect to the nature of the unfair labor practices, there were violations of 8(a)(1), 8(a)(3), 8(a)(4), and 8(a)(5).

8(a)(5) goes to the heart of the bargaining relationship.

8(a)(4) constitutes an attack on employees' access to the Board.

8(a)(3) resulted in discrimination against employees.

8(a)(1) threats of discrimination.

These were certainly the type of unfair labor practices that would cause a lasting detrimental effect until such time as they were remedied. The failure to remedy the above unfair labor practices had a tendency to cause employee disaffection with the Union. That is, employees were out of work with the Respondent, having been discharged and are still out, have not been reinstated to their jobs with full back pay and

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the attendant remedies approved by the Board. There has been no posting of a notice by the employer, that it would no longer violate the Act. None of this occurred.

It is obvious that the effect of the unlawful conduct on employees' morale, their organizational activities and their membership in the Union would be substantial under these circumstances.

With respect to paragraph ten (10) of the Complaint, I find that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing these training positions, assigning a wage rate to them, the one dollar increment, by assigning certain employees to those jobs, by subsequently eliminating those jobs and doing so without affording the Union any notice thereof and the opportunity to bargain concerning these positions. This initially occurred on or about September 22, 1997. I find that the testimony of Union Representative Bevis and to some extent Human Resource Representative Huddleston, particularly with respect to the identification of these exhibits and with General Counsel's Exhibits submitted in this case fully supports this violation. Further, with respect to the change in the radio policy, Bevis' testimony that there had been a change in this policy was not refuted. The Respondent offered only testimony to justify the need for the change. The Respondent did not give the Union notice of these changes and did not offer to bargain with respect to these changes.

Further, with respect to paragraph 12 of the complaint, the evidence submitted herein was that the Respondent did, in fact, unilaterally move unit employees to new shifts and unilaterally implement these shifts without affording the Union notice thereof and an opportunity to bargain.

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On or about December 18, 1997, the Union requested information. It had requested information with respect to the trainer position on December 8th and the requested for information was not furnished regarding the information in the classification status. The Union, also, about that time, requested the Respondent's current policy on substance abuse, current tuition reimbursement policy and its current bereavement policy. And since on or about December 18, the Respondent has failed to furnish them.

The Union also requested information with respect to trainers. This was also not furnished by the Respondent. That was on or about February 2, 1998,

Similarly on March 6, the Union made a request for information with respect to shift movements and elimination of shifts and this was also not furnished.

On January 28, the Respondent withdrew recognition from the Union.

Conclusions of Law:

1.) Tocco, Inc is an employer within the meaning of Section 2(2)(6) and (7) of the Act.

2.) The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3.) Respondent violated Section 8(a)(1) and (5) of the Act by:

A.) Its unilateral assignment of employees to trainer positions and its unilateral establishment of pay rates for those positions.

B.) By changing existing policies regarding employees' use of radios at their work stations.

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C.) By its unilateral transfer of employees to different shifts and its unilateral elimination of shifts.

D.) By its refusal about December 18, 1997 and thereafter to furnish the Union with requested information with respect to its training program and classification and status of trainers and concerning the classifying of employees in accordance with its proposal to declassify employees.⁴ And with its current policy on substance abuse, its current policy on tuition reimbursement and its current policy on bereavement.

E.) Its unlawful withdrawal of recognition from the Union on or about January 28, 1998.

F.) Its failure to comply with the Union's request for information with respect to the trainer position on or about February 2, 1998.

G.) By not complying with a request for information from the Union with respect to the implementation of shift changes affecting the employees on or about March 6, 1998.

4.) The above unfair labor practices in conjunction with Respondent's status as an employer affect commerce within the meaning of Section 2(6) and (7) of the Act.

⁴ Charging Party's requested amendment to decision was granted as requested infra.

Is there anything further before I close the hearing.
Yes.

MR. GIOLITO: Your Honor, I would just ask that you amend your Decision to make clear that you concluded that the employer had violated Section 8(a)(5) of the Act by - - among other things, refusing to provide information requested by the Union on

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December 18 and thereafter concerning the classifying of employees in conforming with its proposal to declassify employees.

JUDGE CULLEN: I will do so.

Additionally, I will enter an Order and I am going to order as requested by the General Counsel that the employer rescind its withdrawal of recognition from the Union.

That it bargain for a reasonable time.

And, that it provide the information requested by the Union.

And, that it rescind all unilateral changes and restore the status quo.

I will enter a more formal Order, which will essentially include the transcript pages in which I have entered my Decision. Now, I may modify that Decision somewhat for any grammatical errors or if I see another case or something else that is relevant, something that I believe that I have not covered, but you can essentially rely on this being the Decision in this case.

At such time that I receive the transcript, I will review the transcript notes and my notes and will modify the Decision, if necessary, to that extent. However, I do not perceive any sub-

stantial modification other than that for grammatical errors or some inadvertent error on my part.

The time for the filing of exceptions in this case will run from the date that I actually implement that Formal Decision.

I believe that the transcript should be received by me in the next ten days or so as I recall.

So, you can fairly well estimate that my Decision will probably be forthcoming in about a week or ten days after that or shortly thereafter.

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Is there anything further before I close the hearing in this case?

MR. OVIATT: My I ask, Your Honor, will you enter that Order the same day you send the Final Decision to us?

JUDGE CULLEN: The procedures; I will send the Final Decision out from this office, it then goes to the Board in Washington. They will actually issue it. It is not issued directly from my office. There may be a slight delay of a few or several days at the most, I would think.

MR. OVIATT: Okay.

JUDGE CULLEN: Anything further before I close the record in this proceeding?

MS. HENDERSON: No, Your Honor.

MR. GIOLITO: No.

MR. OVIATT: No.

JUDGE CULLEN: Thank you.

(Whereupon, the hearing in the above entitled matter was closed at 4:10 p.m. Central Standard Time)